(3)

SEP 1 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 261.

ELIZABETH PARSON CAIN, *Petitioner*,

v.

ALICE CORTICOTA HUTSON AND C. MILTON HUTSON,
Respondents.

BRIEF OF RESPONDENTS, ALICE CORTICOTA HUTSON AND C. MILTON HUTSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES J. HAMM,
Counsel for Respondents.

1223 19th Street, N. W.,
Washington, D. C.

SUBJECT INDEX

PAGE

PRELIMINARY STATEMENT 1

COUNTER STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 3

Point One

The petition discloses no reason for a review of the decision of the Court of Appeals 3

Point Two

The Court of Appeals properly affirmed the final decree of the District Court 5

Point Three

This Court has no jurisdiction over purely local cases arising in the District of Columbia 7

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Bryan v. *Curtis*, 26 App. D. C. 95	5
Buchanan v. *Buchanan*, 71 N. J. Eq. 274, 71 A. 745	6
Craig v. *Blau*, 288 Pa. 547, 136 A. 860	7
Cunningham v. *Rodgers*, 257 U. S. 466	6
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464	7
Hooey v. *Wilson*, 76 U. S. 504, 19 L. Ed. 762	3
Kashouty v. *Deep*, — App. D. C. —, 126 F. 2d 233 (Adv. sheets)	7
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428	7
Lopez v. *U. S.*, 82 F. 2d 982	5
Missouri, etc. Ry. v. *Wulf*, 226 U. S. 570, 57 L. Ed. 355	3
Roberts v. *Consaul*, 24 App. D. C. 551	5
U. S. Trust Co. v. *National Savings and Trust Co.*, 37 App. D. C. 296	6

Statutes and Rules

D. C. Code (1940) T. 11, Sec. 101	7
D. C. Code (1940) T. 20, Secs. 501, 505	7
Purdon's Penn. Stat. Anno. (1930) T. 20, Sec. 772 (as amended July 2, 1937, P. L. 2755, Sec. 2	7
Rule 38c, Revised Rules of the U. S. Supreme Court	4
Rules 20, 21, Rules of Civil Procedure for the District Courts of the United States	5
Art. 3, Sec. 2, Constitution of the U. S	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 261.

ELIZABETH PASCOE CAIN, *Petitioner,*

v.

ALICE COFFROTH HUTSON AND C. MILTON HUTSON,
Respondents.

BRIEF OF RESPONDENTS ALICE COFFROTH HUTSON AND C. MILTON HUTSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The decision of the United States Court of Appeals for the District of Columbia, which petitioner seeks to have reviewed by this court, affirmed the decree of the District Court of the United States for the District of Columbia dismissing the complaint. By her complaint, petitioner sought to recover by an accounting certain sums of money which it is alleged were received by respondents in the form of usury arising out of a conveyance of land and a mortgage and bond given to secure the payment of the purchase price. The complaint was dismissed by the District Court. (R. 46). From the final decree in the District Court, an appeal was taken to the United States Court of Appeals

for the District of Columbia. The Appellate Court affirmed the decree of the District Court. (R. 54). A petition for a rehearing in the Appellate Court was considered by that Court and denied. (R. 56).

COUNTER STATEMENT OF FACTS.

On June 23, 1932, respondents conveyed certain real estate in Somerset County, Pennsylvania, to Cecil B. Pascoe who paid no cash down. The mortgage and bond provided that Pascoe should pay $6800.00 within one year at 6% interest and should also pay $55.00 a month until the principal debt was paid; that the entire debt could be liquidated by the payment of $6500.00, plus interest, and the monthly payments within three months; that after default for ninety days respondents could confess judgment for Pascoe. On August 7, 1933, after default for more than ninety days, judgment was taken on the bond but no money was ever applied to the satisfaction of this judgment by execution. Instead Pascoe authorized the tenants of the real estate purchased from respondents to pay the rents on said property to counsel for respondents. This was done both prior to the death of Pascoe in May, 1935, and afterwards, with the consent of his administrators. In February, 1940, more than nine months after this suit was filed, petitioner herein accepted the final account filed by the original administrators and the administrator d. b. n. and received the balance of $5202.63 remaining after the debts of the C. B. Pascoe estate were paid. (R. 2, 13, 36, 37, 40). The original administrators, Robert Pascoe and Carrie Zerfoss, were appointed by the Register of Wills of Somerset County, Pennsylvania, after petitioner herein and her mother, whose estate she represents as executrix, renounced their rights to letters of administration on the C. B. Pascoe estate. (R. 33).

SUMMARY OF ARGUMENT.

Point One. Petitioner has shown no substantial reason for a review by this Court of the decision of the United States Court of Appeals for the District of Columbia. Jurisdiction is invoked on the authority of *Hooey* v. *Wilson*, 76 U. S. 504, and *Missouri, etc., Railway Co.* v. *Wulf*, 226 U. S. 570. An examination of these cases indicates that they have no application here.

Point Two. The decision of the Court of Appeals was correct in affirming the final decree of the District Court Dismissing the complaint.

Point Three. The United States Supreme Court has no jurisdiction over purely local cases arising in the District of Columbia.

POINT ONE.

Petitioner has shown no substantial reason for a review by this Court of the decision of the United States Court of Appeals for the District of Columbia.

The citation of *Hooey* v. *Wilson*, 76 U. S. 504, and *Missouri, etc., Railway Co.* v *Wulf*, 226 U. S. 570, affords no help to the claims of pettioner in this case. The case of *Hooey* v. *Wilson, supra*, is not in point. Some of the differences between that case and the case at bar are:

1. There the plaintiffs were admittedly proper and necessary parties; here he plaintiff is an improper and unnecessary party.

2. There the suit was defective because Jones and others were omitted as parties; here the suit is defective because the plaintiff herself has no standing in court since she is merely a distributee and not an administrator.

3. There the case invdved a dispute over a transfer of real estate; here the suit involves an alleged claim of money due to the estate of a deceased person. The facts and cir-

cumstances in the two cases differ so widely that there is no basis for comparison.

Neither has the case of *Missouri, etc., Railway Co.* v. *Wulf, supra,* any application. Some of the differences between the two cases may be summarized as follows:

1. There the plaintiff was the sole heir, next of kin, and sole beneficiary of the estate of her son and was actually the temporary administratrix of his estate when the amended petition was filed; here the plaintiff was not the sole heir, next of kin, or sole beneficiary of the C. B. Pascoe estate, but merely executrix of her mother's estate and one of the beneficiaries thereof. At the time plaintiff filed her suit on May 10, 1939, the legally appointed administrators of the C. B. Pascoe estate were actually engaged in the process of settling that estate in Somerset County, Pennsylvania.

2. There it appeared that there were no debts of the estate; here the record shows (R. 39, 40, 41, 42) that C. B. Pascoe left numerous debts which had to be paid out of the assets of his estate.

3. There no administrator had been appointed at the time the original suit was filed; here the administrators of the C. B. Pascoe estate were actually engaged in their work when petitioner filed her suit. It should be noted that the status of petitioner in this case is established as of May 10, 1939. On that date the administrators of the C. B. Pascoe estate were in full control of his estate; on that date petitioner herein was not an administrator of the C. B. Pascoe estate and had no right to function as such.

A consideration of the two cases above-mentioned leaves no room for doubt that the appellate Court did not violate Rule 38c by failing to give proper effect to an applicable decision of this court, hence there is no jurisdiction to grant certiorari to petitioner herein.

POINT TWO.

The Court of Appeals properly affirmed the final decree of the District Court.

Clearly the decision of the Court of Appeals was correct in affirming the final decree of the District Court dismissing the complaint. In the Trial Court, the decision of Justice Bailey (R. 46) rests on the grounds: (1) that any right of action was in the administrator and not in the plaintiff who is a mere distributee; (2) that the Pennsylvania statute of limitations of six months was a condition limiting the right to sue, and an action by the administrator would be useless; and (3) that an action was filed in Pennsylvania (R. 30) seeking the same relief sought by plaintiff and remained undisposed of.

In the Appellate Court the judgment of the Trial Court was affirmed in a short opinion (R. 54) which points out that the administrator was a necessary party to the suit. While no express mention is made of the reasons for dismissal set forth in Justice Bailey's opinion, the implication is clear that those reasons were approved.

The cases, statutes, and rules cited by petitioner on pages 5 and 6 of her brief lend no strength to the argument that petitioner could directly or indirectly sustain her suit. Respondents have no quarrel with the principle that defects in form can be cured by adding or eliminating parties to a suit where the original suit is brought by a person who is a proper party. In the case at bar, however, the petitioner never was and is not now a proper party to this suit. She never was and is not now a personal representative of the C. B. Pascoe estate; nor could she legally act as such merely by naming herself a personal representative. Petitioner does not even suggest that she has any such authority or that she could get it. It is significant that petitioner filed this suit without authority from the administrators of the C. B. Pascoe estate or of any court; that she made no attempt to have the administrators removed for failure to

claim a refund from these respondents on the grounds of usury (R. 51); that the administrators themselves never claimed that the rents collected and applied to the mortgage debt owed these respondents were tainted with usury; and that after filing this suit on May 10, 1939, petitioner accepted the final account of the administrators and received the net estate after payment of the debts of C. B. Pascoe. (R. 32-42). It may fairly be suggested that petitioner is trying to ride two horses in opposite directions. She had complete knowledge of the activities of the administrators, accepted their final account, released their bond and took the net balance of the estate remaining after C. B. Pascoe's debts were paid. In these circumstances she filed a suit against these respondents just as though she had authority to collect money alleged to be due that estate. It is respectfully submitted that petitioner filed this suit on her own responsibility and that it was properly dismissed as such.

United States Trust Company v. *National Savings and Trust Company*, 37 App. D. C. 296, 299 (Pet. Brief, p. 7) is no authority for the contention that amendment by substitution of parties is permissible in a case where the original plaintiff is an improper party, nor is the case authority for the contention that a distributee may sue in circumstances such as are present in this case.

Buchanan v. *Buchanan*, 75 N. J. Eq. 274 (Pet. Brief, p. 10) refutes petitioner's contention that she is a proper party to sue. That case held that only an administrator could litigate the issues involved and that heirs have no standing except in instances where the administrator fails or refuses to sue. In this case, the record shows (R. 30) that the administrators of the C. B. Pascoe estate did file a petition on April 24, 1939, to open the judgment, but discontinued the action following petitioner's suit in the District of Columbia on May 10, 1939.

In *Cunningham* v. *Rodgers*, 257 U. S. 466, this Court in affirming 55 App. D. C. 51, 267 Fed. 609, said:

> "The Court of Appeals held that if the Consul-General's failure to perform his official duties concerning the personal property caused loss, the damage was to the estate, and plaintiff being a mere possible owner of a distributive share, could not recover in his own right—any possible right of action was in the administrator. This we think was clearly right."

In the case at bar the Court of Appeals cited *Kashouty* v. *Deep*, 126 Fed. 2d 233 (Adv. sheets), and *Craig* v. *Blau*, 288 Pa. 547, 136 Atl. 860, to show that the law in the District of Columbia and in Pennsylvania is the same in holding that only the administrator may bring an action to recover assets of the estate of a deceased person. The statutes of both jurisdiction are likewise in harmony. D. C. Code (1940) T. 20, Secs. 501, 505; Purdon's Penn. Statutes Anno. (1930) T. 20, Sec. 772 (as amended July 2, 1937, P. L. 2755, Sec. 2).

POINT THREE.

This Court has no jurisdiction over purely local cases arising in the District of Columbia.

This suit is between two parties all of whom are residents of the District of Columbia, and involves an interpretation of Pennsylvania law.

The appellate jurisdiction of the Supreme Court of the United States is created and limited by Art. 3, Sec. 2 of the Constitution. This Court has recognized its limited appellate jurisdiction in several cases. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428. The fact that D. C. Code (1940) Title 11, Sec. 101, undertakes to vest judicial power in the Supreme Court of the United States does not affect the principle that appellate jurisdiction must ultimately be based on Art. 3, Sec. 2 of the Constitution. It seems clear that the controversy in this case is not one

within the purview of the appellate jurisdiction of this Court.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES J. HAYDEN,
Attorney for Respondents.

August 20, 1942.
1323 18th Street, N. W.,
Washington, D. C.